1985

Becky Lowe v. Sorenson Research Company, Inc., a Utah corporation : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT FOR THE STATE OF UTAH

BECKY LOWE, Plaintiff-Appellant, vs. SORENSON RESEARCH COMPANY, INC., a Utah corporation, Defendant-Respondent.	:	Case No. 20395

BRIEF OF DEFENDANT-RESPONDENT

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE COUNTY, HONORABLE JOHN ROKICH, DISTRICT JUDGE

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STATEMENT OF THE ISSUES

The issues presented on this appeal are as follows:

(a) Absent an express contract of employment for a specified duration, does Utah recognize a cause of action for the alleged "wrongful" termination of an employee?

(b) Absent direction from the Utah legislature, should this court overturn substantial Utah case law precedent which denies a cause of action for alleged "wrongful" termination of an employee?

(c) Absent an express contract of employment for a specified duration, should this court judicially impose an implied covenant of good faith and fair dealing into the employment relationship and

thereby abrogate the terminable-at-will doctrine in Utah.

(d) Absent an express contract of employment for a specified duration, should this court restrict an employer's right to terminate employees only in accordance with an employer's unbargained for and unilateral employee handbook.

(e) Does Utah's Employment Relations and Collective Bargaining Act, Utah Code Ann. § 34-20-1 (1953), as amended, restrict a non-union employer's right to terminate an employee at will?

STATEMENT OF THE CASE

Plaintiff-Appellant Becky Lowe ("Plaintiff") brought this action against her former employer, Defendant-Respondent Sorenson Research Company, Inc., ("Sorenson") for the alleged "wrongful" termination of her employment. Plaintiff's Complaint alleged four separate causes of action against Sorenson, including breach of an implied covenant of good faith and fair dealing, breach of an implied duty to deal in good faith as allegedly imposed by Sorenson's employee handbook, and breach of implied duty to deal in good faith pursuant to Utah's Employment Relations and Collective Bargaining Act. (R. 2-7) Despite plaintiff's assertion in its Brief to the contrary, all

of these Counts, with the exception of Count III for damages for breach of public policy, are based in contract. (R. 2-7) They involve alleged breach of implied contractual covenants which plaintiff attempts to insert into a terminable-at-will employment relationship.

Pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure plaintiff filed a Motion to Dismiss plaintiff's Complaint on the grounds it failed to state a cause of action. (R. 11-26) After the submission of briefs and oral argument the lower court denied Sorenson's initial Motion to Dismiss, without prejudice, to permit plaintiff to conduct discovery to determine if a written contract of employment existed. (R. 49, 53-54) Sorenson was not required to file an answer to plaintiff's Complaint and was free to renew its Motion to Dismiss at the end of the specified discovery period. (R. 49, 53-54) After the discovery, which included the production of plaintiff's employee file and the depositions of Sorenson's personnel manager, production manager and supervisor, (R. 50-52, 55-59) Plaintiff's discovery confirmed the non-existence of an employment contract and established the employment relationship as one terminable-at-will (Plaintiff's Brief at 3). Sorenson's Motion to Dismiss was reheard before the lower court, and the court granted Sorenson's Motion to

Dismiss plaintiff's Complaint as to all counts. (R. 85, 92-93)

STATEMENT OF FACTS

Although this court on review should survey the facts in a light most favorable to plaintiff, Barrus v. Wilkinson, 16 Utah 2d 207, 398 P.2d 204 (1965), Sorenson does not admit any of the allegations of plaintiff's Complaint as true. Nor are the facts, other than the non-existence of an employment contract, necessary or relevant to this appeal, since plaintiff asks this court to create new law. This appeal asks this court only to review the long established Utah case law precedent concerning the terminable-at-will doctrine. Plaintiff sustained injuries in an automobile accident wholly unrelated to her employment and received health and accident benefits from Sorenson for eight months before she returned to work. (R. 3) If Sorenson had been required to answer plaintiff's Complaint, it would have noted that plaintiff was terminated from her employment because she had been absent without leave from her employment after she had returned to work from the rehabilitation from her accident and her termination was in accordance with Sorenson's procedures for termination of such an employee absent without leave for more than three consecutive days. (R. 90)

SUMMARY OF ARGUMENTS

I. Through a long line of cases, Utah has consistently recognized that an employment for an unspecified time constitutes a terminable-at-will relationship which may be terminated by either the employer or employee without notice or cause. Thus, an employee hired for an indefinite time has no right of action against the employer for breach of an employment contract. This law governs this case and is supported by a majority of states, and should continue as the law in the state of Utah.

II. The Supreme Court of Utah has never recognized an implied covenant of good faith and fair dealing in an employment contract and should not do so in this case. The insertion of a covenant of good faith and fair dealing into a terminable-at-will relationship is absolutely inappropriate, since it would directly contradict the terminable-at-will doctrine which permits an employer or employee to quit or be terminated at any time and for any cause. A majority of courts which have addressed this issue have expressly rejected it. The grounds for such rejection are sound and the application of an implied covenant restricting the right of termination would negate the terminable-at-will doctrine in Utah. Additionally, such implied covenants may only be read into express contracts

to aid or further other terms of the contract, and as such are merely derivative of express terms of a contract and have no independent existence. Thus, an implied covenant is not appropriate in a terminable-at-will relationship since it is contradictory to the very terms of the employment contract. Utah case law has also impliedly rejected this argument in the context of an employment relationship.

III. An employer's statements or policies and procedures set forth in employee manuals or booklets do not restrict an employer's right to terminate an employee at will. Employee manuals or policy statements have been recognized by the courts of numerous states as mere unilateral statements of position, unbargained for between employer and employee, which do not create enforceable contract rights. Furthermore, in this case Sorenson's employee handbook does not restrict Sorenson's right to terminate at will.

IV. Absent an express statutory delineation of public policy restricting Sorenson's right to terminate its employees at will, the general rule of termination-at-will applies. No such public policy exists here, and plaintiff's reliance on Utah's Employment Relations and Collective Bargaining Act to imply covenants of good faith and fair dealing is misplaced and the Act is inapplicable here.

V. The recognition of public policy and the balancing of the rights of the employer and the employee are matters within the domain of the Legislature and best accomplished by the Legislature. The Legislature has already limited an employer's right to terminate its employees in several areas, and without an express mandate from the Legislature, this court should not adopt the extremely broad exception to the terminable-at-will doctrine that plaintiff urges on this court.

VI. The terminable-at-will doctrine, as presently recognized in the State of Utah, serves important public policy interests. The doctrine not only provides certainty in the work place and decreases the incidence of vexatious litigation, but also facilitates economic growth and stability. These important public interests strongly support the continued vitality of Utah's terminable-at-will doctrine.

ARGUMENT

I.

PLAINTIFF'S CLAIMS FOR WRONGFUL DISCHARGE WERE PROPERLY DISMISSED BECAUSE NO CLAIM FOR WRONGFUL DISCHARGE CAN BE MAINTAINED IN UTAH ABSENT AN EXPRESS CONTRACT OF EMPLOYMENT.

Plaintiff's claim against Sorenson for alleged wrongful termination of employment asks this court to completely disregard the well established rule that a general

or indefinite hiring, for an unspecified time constitutes a "terminable-at-will" relationship which may be terminated by either the employer or employee at any time, without notice or cause. This general rule of law is the law in Utah. This court, in a long line of cases has consistently declared that employment contracts of indefinite duration are terminable at the will of either party, at any time and for any reason. See, e.g., Held v. American Linen Supply Co., 6 Utah 2d 106, 307 P.2d 210 (1957); Bullock v. Deseret Dodge Truck Center, Inc., 11 Utah 2d 1, 354 P.2d 559 (1960) ("Absent a specified length of time of employment, it is generally recognized that under such a provision either party may terminate the employment at will."). Accord, Crane Co. v. Dahle, 576 P.2d 870 (Utah 1970) ("In the absence of a contract for a definite term, an employee may quit whenever he desires, the same as an employer may fire him.").

In Held, this court, in reversing the district court's refusal to grant defendant American Linen's Motion to Dismiss, quoted the applicable rule as follows:

> In the absence of something in the contract of employment to fix a definite term of service, or other contractual provision to restrict the right of the employer to discharge, or some statutory restriction

> upon this right, an employer may lawfully discharge an employee at what time he pleases and for what cause he chooses, without thereby becoming liable to an action against him. A general contract of hiring is ordinarily deemed a contract terminable at the will of either the employer or the employee. (Emphasis added)

307 P.2d at 211-12.

Again, in Bihlmaier v. Carson, 603 P.2d 790, 792 (Utah 1979) (emphasis added), this court reiterated this general rule, declaring:

> In the absence of some further express or implied stipulation as to the duration of the employment or of a good consideration in addition to the services contracted to be rendered, the contract is no more than an indefinite, general hiring which is terminable at the will of either party. . . .
>
> When an individual is hired for an indefinite time, he has no right of action against his employer for breach of the employment contract upon being discharged.

This court's application of the "terminable-at-will" doctrine has been followed by federal judges applying Utah law to dismiss claims for wrongful termination brought by persons formerly employed under contracts of indefinite duration. See, e.g., Heward v. Western Electric Co., ___ F.2d ___, 116 BNA L.R.R.M. 3423, 3425 (10th Cir. 1984) ("It is essential under

Utah law that in order to modify an employer's right to terminate an at-will employee, there must be some 'further express or implied stipulation' as to the duration of employment."); Amos v. Corporation of Presiding Bishop, 594 F. Supp 791 (D. Utah 1984).[1/] In Amos, Judge Winder rejected the plaintiff's contention that the District Court should follow the minority decisions that have created exceptions to the terminable-at-will doctrine. The plaintiffs in Amos claimed that their claims should be allowed because the terminations allegedly violated "compelling national policy against religious discrimination." In rejecting this argument, Judge Winder stated:

> Although this court has the duty and power to mold the laws of this state when applying uncertain state law, it may not change existing state law. The plaintiffs argue that none of the Utah cases that defendants cite is dispositive because in none of the cases was the Utah Supreme Court asked to recognize a wrongful discharge cause of action. However, the long history of the Utah Supreme Court's recognition of the terminable-at-will doctrine, the language the court has used in dismissing those cases and the failure of the court to even suggest that it might recognize an exception to that

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[1/] In this case the individual plaintiffs brought suit for wrongful discharge against two wholly owned corporation soles of the Church of Jesus Christ of Latter-Day

> rule lead this court to the conclusion that the recognition of an exception to the terminable-at-will doctrine would be a change in Utah law.

Id. at 829-30. (Emphasis added) [citations omitted].

Accordingly, in Utah, an employer's right to terminate a terminable-at-will relationship is unimpaired, except as set forth in express provisions of an employment contract or as restricted by statute. Plaintiff has acknowledged the non-existence of an express contract of employment and admits that the employment was of indefinite duration and subject to the terminable-at-will rule. (Plaintiff's Brief p. 3, 33) Thus, even accepting all of plaintiff's allegations as true for the purpose of this appeal, plaintiff's Complaint fails to state a claim against Sorenson upon which relief can be granted. Accordingly, the lower court's decision in dismissing plaintiff's Complaint should be affirmed.

In order to avoid the effect of the Utah law, plaintiff argues that this court should create new law, in

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1/(con't) Saints ("the Mormon Church"). The individuals were terminated from their employment with the church-owned corporations because of their inability or refusal to satisfy worthiness requirements of the Mormon Church.

tort, for wrongful termination. Despite this argument, plaintiff's Complaint does not address its causes of action in tort, as plaintiff now argues, but rather all, except one, sound in contract. Count I of plaintiff's Complaint seeks recovery for breach of implied covenants of a contract, (R. 5) and Count II for breach of contract for alleged non-compliance with an employee handbook. (R. 6) Only Count III, plaintiff's claim for termination from employment in alleged contravention of public policy, is set forth in terms of a tort action.

As explained more fully below, to permit plaintiff to maintain a cause of action on any one of these theories would nullify the terminable-at-will doctrine which this court has consistently recognized and applied. Consequently, unless this court was to drastically alter the traditional rule regarding terminable-at-will employment in Utah, it should affirm the decision of the lower court.

II.

PLAINTIFF'S CLAIM FOR BREACH OF IMPLIED CONTRACT WAS PROPERLY DISMISSED

Plaintiff argues that this court should recognize a new cause of action for the breach of implied covenants of good faith and fair dealing and thereby permit plaintiff to maintain Count I of its Complaint against Sorenson. In support of this

argument plaintiff cites in Point II of her brief, several Utah cases which plaintiff asserts supports the rule that implied covenants of good faith and fair dealing are read into every contract. Not one of these cases, however, is applicable here. All of the cases cited by plaintiff involve express written contracts, and a recitation of such cases ignores the issue, since here there is no express contract of employment and the employment relationship is governed by the terminable-at-will doctrine.

For example, in Cahoon v. Cahoon, 641 P.2d 140 (Utah 1982), cited by plaintiff, an implied covenant of good faith was applied to a stipulated property settlement in a divorce proceeding, and in Zion's Properties, Inc. v. Holt, 538 P.2d 1319 (Utah 1975), such a covenant was read into an express real estate contract. Plaintiff does not cite one Utah case, however, which holds that implied covenants may be read into an employment relationship in the absence of an express contract.

Here, no express contract of employment existed and accordingly, no covenant of good faith or fair dealing may be implied. To imply such a covenant, in the absence of an express employment contract, is in direct contradiction to the very premise of the terminable-at-will doctrine, and as such has been expressly rejected in states applying this traditional

rule. See Gordon v. Matthew Bender & Co., 562 F. Supp. 1286, 1290 (N.D. Ill. 1983); Lopez v. Bulova Watch Co. Inc., 582 F. Supp. 755 (D.R.I. 1984); Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 685 P.2d 1081 (1984); Maquire v. American Family Life Assurance Co., 442 So. 2d 321 (Fla. Dist. Ct. App. 1983), rev. denied, 451 So. 2d 849 (Fla. 1984) (Florida does not apply the covenant of good faith and fair dealing to employment contracts); Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834 (1983); Murphy v. American Home Products Corp., 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983); Gunn v. Hawaiian Airlines, Inc., 162 Ga. App. 474, 291 S.E.2d 779 (1982); Daniel v. Magma Copper Co., 127 Ariz. 320, 620 P.2d 699 (Ariz. Ct. App. 1980); Larsen v. Motor Supply Company, 117 Ariz. 507, 573 P.2d 907 (Ariz. Ct. App. 1977).

In Gordon, 562 F. Supp. at 1290, the Federal District Court of Illinois held that the implied obligation of fair dealing and good faith, an obligation which is generally read into all express contracts, is inappropriate in a termination case of a terminable-at-will employee because such implied conditions cannot create an independent cause of action. An implied covenant of good faith and fair dealing will only be read into an express contract in aid or furtherance of other

terms of an express agreement, and as such it is a derivative principle only. It must attach to specific contract terms and obligations before it will be read into a contract. Because Gordon was an employee at will, the court held that "the duty to deal in good faith was appended to nothing which had independent life. Therefore no cause of action predicated only on the good faith principle may stand and Count I is dismissed." Id.

Such a finding is inescapable in a terminable-at-will employment case. To hold otherwise would be completely inconsistent with the employer/employee's right to terminate the employment at any time with or without cause. In granting a motion to dismiss for failure to state a claim, the New York Court of Appeals denied this same argument in Murphy. While the New York Court recognized that an obligation of good faith and fair dealing may be implied in an express contract, it held that:

> No obligation can be implied, however, which would be inconsistent with other terms of the contractual relationship. Thus, in the case now before us, plaintiff's employment was at will, a relationship in which law accords the employer an unfettered right to terminate the employment at any time. In the context of such an employment it would be incongruous to say that an inference may be drawn that the employer impliedly agreed

> to a provision which would be destructive of his right of termination. The parties may by express agreement limit or restrict the employer's right of discharge, but to imply such a limitation from the existence of an unrestricted right would be internally inconsistent.

448 N.E.2d at 91. (Emphasis added). The same reasoning is applicable here. Plaintiff asks this court to "bootstrap" an implied obligation, which by law is merely derivative of an express contractual provision (which does not exist in this case), to overcome Sorenson's right to terminate the employment. Such bootstrapping has been rejected by the courts, and is completely inconsistent with the terminable-at-will relationship. See also, Martin v. Federal Life Insurance Company, 109 Ill. App. 3d 596, 440 N.E.2d 998 (1982).

The Supreme Court of Utah in Held, 307 P.2d 210, also impliedly rejected the plaintiff's contention that implied covenants of good faith and fair dealing may be read into an employment-at-will relationship. The court, after reviewing an express contract of employment, rejected the argument that an implied covenant of termination for just cause should be read into the agreement. The court held that in the absence of an express provision it was reasonable to presume that the parties did not intend to limit the common law right of employment at

will. 307 P.2d at 212. Thus, Utah law will not permit an implied covenant to restrict the traditional right of an employer or employee to terminate the employment at will.

The only Utah case cited by plaintiff to support this claim, DCR, Inc. v. Peak Alarm Co., 663 P.2d 433 (Utah 1983), is inapplicable here. In DCR, this court held that a party may be held liable in tort for failing to exercise due care in its performance pursuant to a commercial contract to supply services. Id. at 436. This case is wholly unrelated to the employer/employee situation and is clearly inapplicable here. The court did not hold that the business for whom the services were performed could be sued in tort for terminating an employee relationship. Nor did the court address the conditions under which a contract, particularly an employment contract, may be terminated. Accordingly, DCR's holding is plainly inapplicable here.

Plaintiff urges this court to join the supposed "trend" of courts which have recognized a tort action in employment discharge cases, and suggests that Utah law is antiquated. In support of this argument plaintiff has cited cases from only eight jurisdictions (five of the cases cited are from California courts). Additionally, several of the cases clearly contradict plaintiff's claim. For example, in

Brockmeyer, 113 Wis. 2d 561, 335 N.W.2d 834, cited by plaintiff, the Wisconsin Court rejected the theory that a cause of action based upon an implied covenant of good faith and fair dealing should exist in a terminable-at-will case.[2/] After citing the decisions of Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) and Fortune v. National Cash Register

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2/ Additionally, Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977), does not support the claim that Massachusetts recognizes a cause of action for an implied covenant of good faith in the absence of an express employment agreement. In Fortune, the court read into an express employment contract the obligation of good faith and fair dealing. The court recognized this distinction, stating "On occasion some courts have avoided the rigidity of the "at will" rule by fashioning a remedy in tort. We believe, however, that in this case there is a remedy on the express contract." 364 N.E.2d at 1256.) Subsequently, the Massachusetts court, in Cort v. Bristol Myers, 385 Mass. 300, 431 N.E.2d 908 (1982) held, in the absence of an express employment contract, that the employer may give a false reason or pretext for dismissing an employee at will since the employer is not obligated to provide any reason at all for the termination and no cause of action may exist.

Additionally, the Pennsylvania case cited by plaintiff, Novosel v. Nationwide Insurance Co., 721 F.2d 894, reh'q denied, 115 BNA LRRM 2426, (3d Cir. 1983), remand 118 BNA LRRM 1779 (W.D.Pa. 1985) does not support plaintiff's claim that an action may be maintained on the theory of a breach of an implied covenant of good faith and fair dealing. In Wolk v. Saks Fifth Avenue Inc., 728 F.2d 221, 225 (3d Cir. 1984) the Third Circuit analyzed its decision in Novosel and held:

> [w]hatever the merits of this position, there is as we stated in Novosel, no indication that the Pennsylvania courts have as yet fashioned or indicated their intention to fashion a uniform just cause requirement to all discharges.

Co., 373 Mass. 96, 364 N.E.2d 1251 (1977), which are also cited in plaintiff's Brief, the Wisconsin Supreme Court concluded:

> We refuse to impose a duty to terminate in good faith into employment contracts. To do so would "subject each discharge to judicial incursions into the amorphous concept of bad faith." Parnar v. Americana Hotels, Inc., 65 Haw. 370, 652 P.2d 625, 629 (1982). Moreover, we feel it unnecessary and unwarranted for the courts to become arbiters of any termination that may have a tinge of bad faith attached. Imposing a good faith duty to terminate would unduly restrict an employer's discretion in managing the work force.

355 N.W.2d at 838.

Moreover, the majority of courts which have had occasion to decide this issue have rejected it. In a survey of states which has recently been presented with the request to imply a covenant of good faith and fair dealing into an employment contract, nineteen states have expressly rejected such an argument.[3/] A few of these cases are illustrative. In Thompson, 102 Wash. 2d 219, 685 P.2d 1081 (1984), an

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3/ See, C. Bakaly & J. Grossman, Modern Law of Employment Contracts, Appendix A (1984 Supplement). The states include Arizona, Arkansas, Colorado, Florida, Georgia, Hawaii, Illinois, Kansas, Massachusetts, Missouri, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Washington, and Wisconsin.

employee brought an action against his former employer for wrongful discharge. The Washington court, after reviewing court decisions wherein an implied covenant of good faith or fair dealing was applied, stated:

> We do not adopt this exception. An employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment and this exception does not strike the proper balance. We believe that "to imply into each employment contract a duty to terminate in good faith would . . . subject each discharge to judicial incursions into the amorphous concept of bad faith." Moreover, while an employer may agree to restrict or limit his right to discharge an employee, to imply such a restriction on that right from the existence of a contractual right, which, by its terms has no restrictions, is internally inconsistent.

685 P.2d at 1086, quoting Parnar, 65 Haw. at 377, 652 P.2d at 629; Accord, Brockmeyer, 113 Wis. 2d 561, 3335 N.W.2d 834; Daniel, 127 Ariz. 320, 620 P.2d 699; Accord, Murphy, 58 N.Y.2d 293, 448 N.E. 2086, 461 N.Y.S.2d 232 (emphasis added) [citations omitted]. The court also noted that such an intrusion into the employment relationship was a matter more appropriate for the legislature. Id. at 1086-1087. In Daniel, 620 P.2d at 703, the court refused to follow Monge's holding of implied covenants of good faith and fair dealing in an employment contract. The court noted that:

> We refuse to follow Monge. The effect of adhering to such a rule would be to expose an employer to a lawsuit every time he discharges an employee with a contract terminable at will. Under the Monge rule, such a contract is transformed into a hybrid contract under which the employee cannot be discharged unless his work is unsatisfactory or his services are no longer needed. The Monge court resolved the issue by rewriting the employment contract so that an employee cannot be fired except for cause. In that way, the Monge decision is a substitute for a union collective bargaining agreement.

In Martin, 440 N.E.2d at 1006, the court held "[c]are must be taken to prevent the transmutation of every breach of contract into an independent tort action through the bootstrapping of the general contract principle of good faith and fair dealing. We conclude that existing principles of tort law are adequate without our creating a new action based on a vague notion of fair dealing."

Even the minority courts which recognize a claim for breach of an implied covenant of good faith in employment contracts emphasize that the exception should not be used as a basis for judicial policy-making in contravention of an employer's fundamental right to operate its business. In Fortune, 364 N.E.2d at 1257, relied on by plaintiff to support her claim for wrongful termination, the court held that discharging an agent/employee to preclude payment of

substantial commissions which the agent had earned, constituted an actionable claim for bad faith termination. In so holding, however, the Massachusetts court stressed that its decision was based solely upon the employer's bad faith denial of commissions which the terminated employee had earned. The court did not endorse review of an employer's right to terminate. It noted:

> We do not question the general principles that an employer is entitled to be motivated by and to serve its own legitimate business interests; that an employer must have wide latitude in deciding whom it will employ in the face of the uncertainties of the business world; and that an employer needs flexibility in the face of changing circumstances.

Id. at 1256. (Emphasis added). See also Shapiro v. Wells Fargo Realty Advisors, 152 Cal. App. 3d 467, 199 Cal. Rptr. 613, 619 (1984) (noting that the law of bad-faith breach of contract is well developed only in the insurance field; complaint for breach of implied covenant dismissed).

The judicial insertion of a covenant of good faith and fair dealing into a terminable-at-will employment relationship would be inconsistent with an employer/employee's unrestrained right to terminate employment and would completely nullify the effect of that doctrine. The

modification of the terminable-at-will rule would result in a judicial rewriting of each contract between an employer and employee and subject each discharge to judicial review. This court should join the majority of courts which have correctly reviewed this issue and reject plaintiff's argument.

III.

UTAH DOES NOT RECOGNIZE A CAUSE OF ACTION FOR TERMINATION OF EMPLOYMENT UPON BREACH OF AN EMPLOYEE HANDBOOK

In Count II of plaintiff's Complaint, plaintiff alleges that Sorenson's employee handbook imposes upon Sorenson a duty to deal with plaintiff fairly and in good faith and to refrain from termination except for "good cause." (R. 6) Nowhere, however, is there reference in plaintiff's brief to a provision in Sorenson's employee handbook limiting its right to terminate to "good cause". There is no such provision. Plaintiff alleges, however, that a "good cause" provision for termination be read into the employment relationship and that, a cause of action in tort may exist for its breach. Despite plaintiff's characterization of this action as an action in tort (Plaintiff's Brief at 20), it is an action based on contract. The minority decisions cited by plaintiff which have held that an employer's policy manual or handbook may contractually modify the employer's right to terminate-at-will,

have characterized the cause of action as one of contract, and have required that the elements of contract, i.e., formation, offer, acceptance and consideration be present. See, Thompson, 102 Wash. 2d 219, 685 P.2d 1081; Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980); Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981). Those contractual elements do not exist in this case.

Furthermore, the cases cited by plaintiff are easily distinguishable from this case. In Toussaint, 292 N.W.2d at 893, the employee manual in question expressly stated that Blue Cross would "release employees for just cause only." Additionally the employee received oral assurances of job security before accepting employment. Id. at 890. In See's Candies, 171 Cal. Rptr. at 917, the same type of oral assurances and the same limiting clause of dismissal only for cause existed. This case is clearly distinguishable on these points. Sorenson's employee handbook does not restrict Sorenson's right to terminate for "good cause." Thus, even applying the decisions of Toussaint and See's Candies, absent any language in the employee's handbook limiting Sorenson's right to terminate an employee for just cause, or oral assurances of job security, no cause of action exists even in those states which have recognized a cause of action for breach of an employee handbook.

The majority of courts which have considered plaintiff's argument have rejected it. The rule of law followed by these courts provides that an employee manual or an employer's policy statement is merely a unilateral statement of position of the employer, which provides mere guidelines which may or may not be followed at the employer's discretion. In Gates v. Life of Montana Insurance Co., 196 Mont. 178, 638 P.2d 1063 (1982), later appealed, 668 P.2d 213 (Mont. 1983) the plaintiff's employer alleged that her termination was contrary to the terms of an employee handbook, which specified that prior to termination for unsatisfactory performance a warning would be given to the employee. Id. at 1066. In rejecting this argument, the court held that the handbook was merely "a unilateral statement of company policies and procedures. Its terms were not bargained for, and there was no meeting of the minds. The policies may be changed unilaterally at any time." Id.

In Johnson v. National Beef Packing Co., 220 Kan. 52, 551 P.2d 779 (1976) the plaintiff sought to establish an employment contract by arguing that the employer's "Company Policy Manual" constituted an express contract of employment which limited the employer's right to terminate to "just cause." In discussing the employee manual, the Kansas Supreme Court held:

> It appears to be a general statement of company policies dealing with employee's benefits, insurance, vacations, holidays, etc., as well as general operating procedures and plant rules. . . . We find nothing in the manual expressly providing for a fixed term of employment, nor is there language from which a contract to that effect could be inferred.
>
> It was only a unilateral expression of company policy and procedures. Its terms were not bargained for by the parties and any benefits conferred by it were mere gratuities. Certainly, no meeting of the minds was evidenced by the defendant's unilateral act of publishing company policy.

551 P.2d at 782. Additionally, in Reynolds Manufacturing Co. v. Mendoza, 644 S.W.2d 536 (Tex. Ct. App. 1982) the court dismissed the plaintiff's argument that the employer was liable for wrongful termination for not following the termination policy set forth in its employee manual which required a warning and probation prior to termination. The court found that the employer was in no way prevented from unilaterally amending or even withdrawing the handbook and that such handbooks constituted no more than general guidelines which would not restrict the manner or method of termination. Id. at 539. See also, Enis v. Continental Illinois National Bank & Trust Co., 582 F. Supp. 876 (N.D. Ill. 1984); Muller v. Stromberg Carlson Corp., 427 So. 2d 266 (Fla. Dist. Ct. App. 1983); White v. Chelsea Industries, Inc., 425 So. 2d 1090 (Ala.

1983); Heideck v. Kent General Hospital, Inc., 446 A.2d 1095 (Del. Super. Ct. 1982) (employee booklet does not alter at will employment since it is unilateral expression of guidelines); Cf. Simpson v. Western Graphics Corp., 293 Or.96 643 P.2d 1276, 1278-79 (1982) (just cause for termination statement in employee handbook satisfied if employer reasonably and in good faith believes sufficient cause for termination exists; jury not entitled to decide whether facts amounting to just cause exist); Cote v. Burroughs Wellcome Co., 558 F. Supp. 883 (E.D. Pa. 1982) (personnel policies are not part of the employment contract when such policies were unilaterally implemented by the employer and could be changed by it.); Campbell v. Eli Lilly & Co., 421 N.E.2d 1099 (Ind. 1981); Mau v. Omaha National Bank, 207 Neb. 308, 299 N.W.2d 147 (1980); Sargent v. Illinois Institute of Technology, 78 Ill. App. 3d 117, 397 N.E.2d 443 (1979) (a personnel manual not an enforceable contract because it was not bargained for nor was any consideration given); Shaw v. S.S. Kresge Co., 167 Ind. App. 1, 328 N.E.2d 775 (1975) (handbook not binding because employment relationship terminable at will and employee did not limit his right to quit work).

The only Utah case relied upon by plaintiff in support of this claim is Piacitelli v. Southern Utah State College, 636

P.2d 1063 (Utah 1981). In Piacitelli, a counselor at Southern Utah State College brought suit, alleging that the College's decision not to renew his yearly employment contract was not in compliance with the procedures for dismissing employees contained in the College's personnel manual. Id. at 1064. At the trial level the district court held that the plaintiff could be terminated only pursuant to the procedures contained in the College's personnel manual. Id. at 1065. That final decision by the lower court was not appealed. Subsequently the counselor brought a separate action seeking reinstatement and back pay. Id. On appeal, this court affirmed the lower court's order denying reinstatement and awarding back pay, but emphasized that it was not affirming the district court's earlier ruling that the College's personnel manual was part of the plaintiff's contract of employment. Referring to that earlier ruling by the district court, the court declared:

> This was a final order, which unless reversed on appeal is res judicata and binding upon these parties. The order was not appealed. Consequently, for purposes of this case, we must treat Piacitelli as an employee with permanent employment status whose employment contract entitled him to the formal procedures specified in the Personnel Manual before he could be dismissed or terminated, even at the conclusion of the annual contract period.

Id. at 1065.[4/] The Piacitelli decision cannot be cited as precedent in this case. This court did not decide whether an at-will employee working under a contract of indefinite duration may sue for breach of an implied contract under Utah law. Because the court was bound, under principles of res judicata, to treat the plaintiff as a permanent employee who was entitled under this contract to certain review procedures prior to termination, the court had no opportunity to address the terminable-at-will rule. Consequently, the rule articulated by the court in Bihlmaier continues to be the law in Utah regarding at-will employment contracts. Cf. Williams v. West Jordan City, 714 F.2d 1017, 1020 (10th Cir. 1983); Heward v. Western Electric Co., ____ F.2d ____, 116 BNA

[4/] In a footnote to the foregoing text in Piacitelli, the court further emphasized that it was not deciding whether the lower court's ruling on the personnel manual was correct. It stated:

> We intimate no agreement or disagreement with the court's construction of Piacitelli's employment status or with its conclusion on the rights of classified College employees receiving annual notices of appointment. The fact that the question is res judicata settles those questions for these litigants in this case only.

Id. n.2 (emphasis added).

L.R.R.M. 3423 (10th Cir. 1984), (declaring that Bihlmaier continues to be the law in Utah on termination of persons employed under contracts of indefinite duration).

As noted above, this case does not rise to the same level as the decision in Toussaint, and See's Candies. Sorenson's employee handbook does not establish a contract of employment for a specific duration of time, nor does it require that a termination be made only for "just cause". Nothing in the handbook limits the terminable-at-will relationship that exists in this case, and this court should affirm the lower court's decision dismissing plaintiff's Complaint.

IV.

PUBLIC POLICY OF THE STATE OF UTAH DOES NOT RESTRICT THE RIGHT OF TERMINATION IN THIS CASE.

Plaintiff also seeks to avoid the effects of the terminable-at-will doctrine by asking this court to create a "public policy" exception to the employment-at-will doctrine. In Count III of plaintiff's Complaint, it asserts that public policy of the State of Utah, as codified in Utah Code Ann. §§ 34-20-1 to 34-20-13 (1953), as amended, imposes upon employers an implied contractual duty to "act fairly and in good faith" and "to refrain from terminating its employees for reasons which are contrary to such public policy." Despite

such a contention, this court has never recognized a "public policy" exception to the doctrine of employment-at-will, nor would such an exception be applicable in this case.

In Amos v. Corporation of Presiding Bishop, 594 F. Supp. at 829, the plaintiffs contended that they should be entitled to maintain a cause of action for wrongful termination because the firing of plaintiffs for religious reasons violated a compelling national policy against religious discrimination. The court acknowledged the minority of decisions which have created the public policy exception but held that Utah law did not recognize such an exception. The court noted:

> The long history of the Utah Supreme Court's recognition of the terminable-at-will doctrine, the language the Court has used in dismissing those cases and the failure of the Court to ever suggest that it might recognize an exception to that rule lead this Court to the conclusion that the recognition of an exception to the terminable-at-will doctrine would be a change in Utah law."

Id. Utah has recognized no exception to the terminable-at-will doctrine, and this court should affirm the lower court's decision in dismissing plaintiff's complaint.

Although Utah has not acknolwedged a "public policy" exception, the facts in this case do not demonstrate that

public policy was violated. The minority decisions which have granted a cause of action for wrongful termination in contravention of a clearly articulated public policy have, for the most part, been very limited in their scope. These courts have ruled the terminable-at-will doctrine inapplicable when an employee is discharged for refusing to violate a criminal statute, or when exercising a statutory right or complying with a statutory duty. For example, in Petermann v. International Brotherhood of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959), the leading case on the public policy exception, the plaintiff was discharged for failure to commit perjury before a legislative committee. The California court recognized that the public policy of the state, as reflected in the penal code would be seriously impaired. 344 P.2d at 27. A public policy exception was also recognized by the Oregon Court when a discharge was premised on the employee's participation in jury duty, in contravention of public policy expressed in the state constitution, Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975), and in Indiana where the public policy was violated by termination of an employee for the filing of a workmen's compensation claim. Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973). However, "in view of the somewhat vague meaning of the term public policy, few courts

have been inclined to apply the public policy exception absent a violation of statutes or clearly defined policy." Parnar, 652 P.2d at 630-31 (emphasis added). The court in Parnar acknowledged:

> In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme. . . . However, courts should proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject.

Id. at 631. (Emphasis added).

Similar reasoning was applied in Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980), a case cited extensively by plaintiff. In Pierce, the court found no violation of public policy when a physician/employee was terminated for refusal to work on a drug research project, and the court held that "an employer may discharge an employee who refuses to work unless the refusal is based on a clear mandate of public policy." 417 A.2d at 514. In Brockmeyer, 834 N.W.2d at 840,[5/] the court, while recognizing a narrow public policy

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5/ The cases cited in plaintiff's brief to support a public policy exception unanimously recognize that the public policy exception is very limited in scope. In addition to

exception, held that such an exception is limited to a discharge contrary to a "fundamental and well defined public policy as evidenced by existing law" and that "[c]ourts should proceed cautiously when making public policy determinations. No employer should be subject to suit merely because a discharged employee's conduct was praiseworthy or because the public may have denied some benefit from it."

In this case no clear legislative mandate has been violated, nor does a clear mandate of public policy exist. Plaintiff relies solely upon Utah Code Ann. §§ 34-20-1 to 34-20-13, as the mandate of legislative authority which allegedly restricts the terminable-at-will doctrine. This section of the Code is entitled "Employment Relations and Collective Bargaining" and deals entirely with the relationship of the employer and employee in the collective bargaining context. It provides for the establishment of a labor

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5/(con't) those noted above, all agree on this principle. Thompson, 102 Wash. 2d 219, 685 P.2d 1081 (1984) (accepts a narrow public policy exception: the employee must prove that a stated public policy, either legislatively or judicially recognized, has been violated); Palmateer v. International Harvester Co., 85 Ill.2d 124, 421 N.E.2d 876 (1981) (dismissal for informing law enforcement officers of violation of criminal statute); Harless v. First National Bank, 162 W.Va. 116, 246 S.E.2d 270 (1978) (discharge for reporting violations of state and federal consumer credit and protection laws.)

relations board and defines the rights and duties of employers and employees in the collective bargaining context. In subsection 8 of this section of the Code, it generally prohibits employers from interfering with the employee's right to organize and bargain collectively, and paragraph 17(f) specifically prohibits an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this act."

The policy expressed in Utah's Employment Relations and Collective Bargaining Act is expressly limited to the collective bargaining area. In subsection 4 of that Act it states that the policy of the state is "to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which those interests may have their respective rights and obligations adjudicated." This policy is effectuated by the creation of the Labor Relations Board and unfair labor practices designated by the Legislature are heard before that Board. Nowhere in this section does it discuss employer-employee relationships outside of the area of collective bargaining and nowhere does it require the implied obligations of good faith and fair dealing to be superimposed into employment relationships. This statute is clearly inapplicable to this case and does not

represent the required "clear mandate" of the legislature to limit or restrict the terminable-at-will relationship between an employer and employee. Sorenson is a non-union employer and plaintiff does not allege in its Complaint that plaintiff was terminated for participation in any union activities. Thus, even in those minority states which have acknowledged a narrow public policy exception, this case does not present a violation of public policy.

V.

ONLY THE LEGISLATURE MAY MODIFY THE TERMINABLE-AT-WILL DOCTRINE

The interpretation of public policy and the establishment of laws to promote or protect public policy are matters best accomplished by the Legislature. In particular, the Legislature is the appropriate forum to consider and accommodate the competing interests that would be affected by a change in the terminable-at-will employment doctrine. See Murphy, 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983).

In Murphy, the New York Court, in affirming a dismissal of plaintiff's claims for wrongful discharge, emphasized that it could recognize the plaintiff's cause of action only by altering the traditional at-will doctrine and declined to do so without an express mandate from the Legislature. The court noted that:

> Those jurisdictions that have modified the traditional at-will rule appear to have been motivated by conclusions that the freedom of contract underpinnings of the rule have become outdated, that individual employees in the modern work force do not have the bargaining power to negotiate security for the jobs on which they have grown to rely, and that the rule yields harsh results for those employees who do not enjoy the benefits of express contractual limitations on the power of dismissal. Whether these conclusions are supportable or whether for other compelling reasons employers should, as a matter of policy, be held liable to at-will employees discharged in circumstances for which no liability has existed at common law, are issues better left to resolution at the hands of the Legislature. In addition to the fundamental question whether such liability should be recognized . . ., of no less practical importance is the definition of its configuration if it is to be recognized....
>
> The Legislature has infinitely greater resources and procedural means to discern the public will, to examine the variety of pertinent considerations, to elicit the views of the various segments of the community that would be directly affected and in any event critically interested, and to investigate and anticipate the impact of imposition of such liability.

Id. 461 N.Y.S.2d at 234-235.

Numerous other courts have also refused to recognize exceptions for the terminable-at-will doctrine without the deliberation and pronouncement by their respective legislatures. See, Fletcher v. Wesley Medical Center, 585 F. Supp. 1260 (D. Kan. 1984) (the Kansas court would adhere to the

view expressed in Murphy); Walker v. Modern Realty of Missouri Inc., 675 F.2d 1002 (8th Cir. 1982) (an implied obligation of good faith must be created by the law-making authority); Kelly v. Mississippi Valley Gas Co., 397 So.2d 874 (Miss. 1981) (in the absence of legislatively provided sanctions an employee will have no cause of action); Watson v. Zep Manufacturing Co., 582 S.W.2d 178 (Tex. Civ. App. 1979) (if such an obligation is read into every employment agreement, the legislature must make that determination).

These considerations should be given controlling weight here. The Utah Legislature has already expressly prohibited the denial of employment opportunities for some reasons and none of these reasons are applicable in this case.[6/]

In this connection, the Supreme Court of Hawaii recently declared, after noting that few courts have been

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6/ See Utah Code Ann. §§ 34-35-1 to 34-35-8 (1953) (Anti-Discrimination Act, forbidding employment decisions made on the basis of race, color, religion, sex, ancestry, age, national origin, or handicap). Utah Code Ann. § 34-37-16 (forbidding employers to deny or terminate employment because of refusal to submit to polygraph examination); Utah Code Ann. § 34-20-8(f) (prohibiting termination for filing charges or giving testimony in unfair labor practice proceeding). Current Utah law thus indicates that the Legislature has already seen fit to limit an employer's right to terminate employees for discriminatory reasons or for other reasons deemed violative of public policy.

inclined to apply the public policy exception absent a clearly defined public policy, that "[t]hese decisions manifest a reluctance of courts to unjustifiably intrude on the employment arrangement or to arrogate to themselves the perceived legislative function of declaring public policy." Parnar, 652 P.2d at 631. Thus, in light of the Legislature's ability and inclination to limit the employment-at-will doctrine in very specific instances, this court should decline to adopt the extremely broad exception to the terminable-at-will doctrine which plaintiff urges.

VI.

PUBLIC POLICY SUPPORTS THE CONTINUED VITALITY OF UTAH'S TERMINABLE-AT-WILL DOCTRINE

As early as 1877, the United States courts developed the employment-at-will doctrine. H.G. Wood, in his treatise on master-servant relationships, articulated the following rule:

> With us the rule is inflexible that a general or indefinite hiring is prima facia a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.

H. Wood, Master and Servant § 134 (2d ed. 1886). The judiciary found that Wood's Rule equitably facilitated economic and industrial development, provided the employer flexibility to control his work place and allowed the employee the freedom to resign if he found more favorable employment or if working conditions became intolerable.

Although limited exceptions to the terminable-at-will doctrine have developed in a minority of states, the terminable-at-will doctrine is widely recognized. In addition to specific statutory exceptions, some state courts have developed a public policy exception which limits causes of action to four types of employment discharges: (1) discharges for refusing to violate a criminal statute; (2) discharges for exercising a statutory right; (3) discharges for fulfilling a statutory duty; and (4) discharges in violation of a general public policy. See Comment, Limiting the Right to Terminate at Will -- Have the Courts Forgotten the Employer?, 35 Vander. L. Rev. 201, 203-04 (1982). While these exceptions to the at-will doctrine preserve certain public vital interests, the terminable-at-will doctrine itself serves many important public policy interests.

Though some critics of the employment-at-will doctrine have suggested the need for change, a thorough analysis of the

terminable-at-will doctrine demonstrates the legitimate countervailing interests of the employer. Those interests should not be ignored. The court in Monge v. Bebbe Rubber Co., 114 N.H. 130, 316 A.2d 549 recognized the importance of balancing the competing public interests.

> In all employment contracts, whether at will or for definite term, the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two.

316 A.2d at 551 (emphasis added). In carefully balancing the interests of the employer, the employee and society, this court should consider the following public interests which are served by the terminable-at-will doctrine. The terminable-at-will doctrine, as recognized in Utah and the majority of states, provides 1) greater certainty in the work place; 2) decreases the incidence of improper and vexatious lawsuits; and 3) facilitates economic development. See generally Comment, supra at 223-31.

First, even the limited judicial expansion of the public policy exception to the terminable-at-will doctrine has created an atmosphere of uncertainty in the work place; neither the employer nor the employee can be certain whether a

particular discharge is a violation of a "general public policy." This uncertainty has arisen because of the absence of clearly defined public policy standards by which the parameters of a proper cause of action may be established. Because of this vagueness, an employer may honestly believe he is justified in discharging an employee, while the distraught employee interprets the dismissal to be in bad faith or in retaliation. The employer might thus be forced to litigate the merits of a discharge that he had no way of knowing in advance might be considered unfair.

Addressing the effects of a broad public policy exception, the court in Daniel v. Magma Copper Co., 127 Ariz. 320, 620 P.2d 699 recognized that "[t]he effect of adhering to such a rule would be to expose an employer to a lawsuit every time he discharged an employee with a contract terminable-at-will." Id. at 703. It has been noted that:

> Judicially created exceptions to the terminable at will doctrine without clear bases [sic] in legislatively articulated public policy create uncertainty because an employer cannot be assured that a court will not, in hindsight, decide that an employee's conduct was in the best interests of the state and, therefore, favored by public policy. . . . Under existing guidelines, the boundaries of these actions are defined only by the imagination of the plaintiff's attorneys.

See Comment, supra at 228 (emphasis added). In addition, it has been argued that the New Jersey Supreme Court, in expanding its public policy exception to the at-will doctrine,

> has eroded employer discretion to direct the work place and has placed courts in the position of supervising employer-employee relations. By creating an exception to the at-will doctrine based on public policy, the court has established a vague, unworkable concept as its touch stone.

Note, Pierce v. Ortho Pharmaceutical Corp.: Is the Public Policy Exception to the At Will Doctrine a Bad Omen for the Employment Relationship?, 33 Rutgers L. Rev. 1187, 1194 (1981).

Accordingly, Utah's terminable-at-will doctrine provides both employees and employers with notice of what constitutes grounds for discharging an employee working pursuant to a terminable-at-will contract. The clarity and decisiveness of Utah's terminable-at-will doctrine and of a narrow "public policy" exception as expressed by the Legislature, promotes the public's interest in certainty within the work place.

Second, judicial expansion of the public policy exception to the employment-at-will doctrine may also subject employers to vexatious lawsuits. Under the Monge rationale, an employee may claim that his discharge was motivated by bad

faith, malice, or retaliation and, therefore, is not in the interest of the public good. The decision in Fortune sets forth that an employee may simply allege bad faith on the part of the employer. Further, jurisdictions following the Palmateer and Harless decisions afford no clear standards to guide an employer in evaluating whether an employee's conduct justifies dismissal. Given these unclear judicial standards the employer is an easy target of terminated employees and is continually exposed to the threat of suit for wrongful discharge. Expansive public policy exceptions to the terminable-at-will doctrine encourage vexatious claims from discharged employees. Moreover, often employers must settle wrongful discharge claims out of court, given the tendency of juries to side with the employee and the employer's difficulty in obtaining summary judgment. See generally Comment, supra notes 124-27 and accompanying text.

Third, courts defining the public policy exception must also consider the economic impact of their decisions. The courts have long recognized the "legitimate interest of employers in hiring and retaining the best personnel available." Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174, 179 (1974). Utan's terminable-at-will doctrine facilitates uninhibited employment evaluations by employers,

thereby promoting more efficient performance and production. The effect of broadening the scope of the public policy exception "will be to allow the courts to become arbiters of employment relations and to diminish employer discretion to direct the work place." Id. at 179. Further, the Geary court noted that the continuing threat of suit will "hinder employers in making critical judgments concerning employee qualifications." Id. See Note, supra at 1195. Finally, an expansive public policy exception to the at-will doctrine, as upheld in Pierce, "infringes on the private employer's freedom to direct his own business without interference from the courts or any other adjudicatory mechanism." Note, supra at 1197-98. The exception is particularly intrusive with respect to the managerial employees whose loyalty is essential to an orderly work place. Professor Blades recognized this important public interest as follows:

> The employer's evaluation of the higher ranking employee is usually a highly personalized, intuitive judgment, and, as such, is more difficult to translate into concrete reasons which someone else--a juryman--can readily understand and appreciate. . . . Compromise of the employer's power to make such judgments about professional, managerial or other high-ranking employees . . . is especially undesirable.

See generally Comment, supra at 229-30., quoting Blades, Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 Colum. L. Rev. 1404, 1428-29 (1967).

Expanding exceptions to the terminable-at-will doctrine certainly increases an employer's hesitancy to fire an employee. Such hesitancy will lead not only to a drop in production efficiency, but also to a corresponding increase in cost. Several courts have expressed their unwillingness to infringe upon the employer's business judgment in this area. See Comment, supra at 230. Of major concern to the economic well-being of our nation, is a business' ability to respond flexibly to changing economic conditions.

> Fluctuations in the business cycle, shifts in demand, or technological changes sometimes require firms to lay off workers temporarily or to cut back the size of departments permanently. Managers should be free to make these decisions without the threat of litigation by workers claiming that they were wrongfully discharged. A workable definition of wrongful discharge can be formulated to shelter these decisions for the possibility of debilitating litigation.

Comment, Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 Harv. L. Rev. 1816, 1835 (1980).

> Increased liability for wrongful discharge will generally raise the costs of hiring and firing. By altering only one term -- termination rights -- among a range of possible terms, which include wage rates, working conditions, and fringe benefits, the court leaves the employer free to shift the costs of the new protection in most cases employees will eventually wind up "paying" at least part of the new term's cost. Thus, . . . abolition of the at-will rule will not significantly change the overall balance if advantage between employers and employees.

Id. at 1829.

The continued vitality of Utah's terminable-at-will doctrine also finds support in the following economic considerations. Utah's terminable-at-will doctrine presently provides significant disincentives to an employer who discharges any employee. Arbitrary discharges often result in a waste or loss of recruiting time, training expense, job expertise and continuity. To the extent the employer bears these costs, he will limit the number of wrongful or economically inefficient discharges in order to minimize his losses. Id. at 1834. Further, an employer's legitimate concern with the possibility of fraudulent, frivolous, or nuisance suits being brought by disgruntled employees who were discharged for perfectly valid reasons provides an additional safeguard against unwarranted discharges. See Blades, supra, n. 5, at 1427-30.

In the instant action no legislatively articulated public policy has been violated. On the contrary, the defendant, in good faith and for a justifiable purpose, has exercised sound management discretion in discharging the plaintiff for failing to report to work. The defendant made reasonable attempts to preserve the plaintiff's employment relationship; nevertheless, when the plaintiff's failure to report to work reached the point of becoming economically inefficient, the defendant had no choice but to exercise its right to termination. As noted by Baxter & Wohl, Wrongful Termination Lawsuits: The Employers Finally Win a Few, 10 Employ. Rel. L.J. 258, 269 (1984), "[e]mployers are not omniscient. Like all mortals, they can act only on the evidence known to them." To restrict the application of Utah's long-standing terminable-at-will doctrine would be to paralyze managerial decision making. Such a restriction would clearly contravene the public's interests in fostering certainty in the marketplace, in reducing the incidence of improper and vexatious lawsuits in the already crowded courts, and in having strong economic growth and development.

CONCLUSION

Under well established Utah law, plaintiff does not have a cause of action for alleged wrongful termination of

employment in Utah because the employment was of an indefinite duration and therefore terminable at the will of either party. This court has previously rejected the argument that Utah should recognize a new cause of action for wrongful termination under an implied obligation of good faith and fair dealing. Although Utah has not had to decide whether public policy or an employee handbook should limit or extinguish the terminable-at-will doctrine in Utah, this court should follow the well reasoned opinions of the majority of courts that have decided such issues, and reject them. To accept plaintiff's arguments would fundamentally change the employment law and practices in the State of Utah, a function which is within the propriety of the Legislature. The policy reasons for the application of the terminable-at-will doctrine in Utah are sound, and this court should not expand the exceptions to this rule without a clear mandate from the Legislature.

For the foregoing reasons, the lower court's decision dismissing plaintiff's Complaint should be affirmed.

RESPECTFULLY SUBMITTED this 19th day of June, 1985.

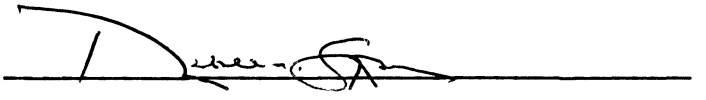
JONES, WALDO, HOLBROOK & McDONOUGH

By _____
W. Robert Wright
Randall N. Skanchy
Attorneys for Defendant-Respondent
Sorenson Research Company

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of June, 1985, I caused to be mailed, postage prepaid, by first-class mail, four true and correct copies of the foregoing BRIEF OF DEFENDANT-RESPONDENT SORENSON RESEARCH COMPANY, INC., to the following:

H. Ralph Klemm
500 Clark-Leaming Office Center
175 South West Temple
Salt Lake City, Utah 84101



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ADDENDUM

CHAPTER 20

EMPLOYMENT RELATIONS AND COLLECTIVE BARGAINING

34-20-1. Declaration of policy.—The public policy of the state as to employment relations and collective bargaining in the furtherance of which this chapter is enacted, is declared to be as follows:

(1) It recognizes that there are three major interests involved, namely: that of the public, the employee, and the employer. These three interests are to a considerable extent interrelated. It is the policy of the state to protect and promote each of these interests with due regard to the situation and to the rights of the others.

(2) Industrial peace, regular and adequate income for the employee, and uninterrupted production of goods and services are promotive of all of these interests. They are largely dependent upon the maintenance of fair, friendly, and mutually satisfactory employment relations and the availability of suitable machinery for the peaceful adjustment of whatever controversies may arise. It is recognized that certain employers, including farmers and farmer co-operatives, in addition to their general employer problems, face special problems arising from perishable commodities and seasonal production which require adequate considera-

tion. It is also recognized that whatever may be the rights of disputants with respect to each other in any controversy regarding employment relations, they should not be permitted in the conduct of their controversy to intrude directly into the primary rights of third parties to earn a livelihood, transact business, and engage in the ordinary affairs of life by any lawful means and free from molestation, interference, restraint, or coercion.

(3) Negotiation of terms and conditions of work should result from voluntary agreement between employer and employee. For the purpose of such negotiation an employee has the right, if he desires, to associate with others in organizing and bargaining collectively through representatives of his own choosing, without intimidation or coercion from any source.

(4) It is the policy of the state, in order to preserve and promote the interests of the public, the employee, and the employer alike, to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjudicated.

History: C. 1953, 34-20-1, enacted by L. 1969, ch. 85, § 14.

Cross-Reference.

Injunctions in labor disputes, 34-19-2 et seq.

Collateral References.

Labor Relations⇨171.

51 C.J.S. Labor Relations § 119.

48 Am. Jur. 2d 752, Labor and Labor Relations § 1198.

Subjects of mandatory collective bargaining under Federal Labor Relations Act, 12 A. L. R. 2d 265.

34-20-2. Definitions.—As used in this chapter:

(1) The word "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy or receivers.

(2) The word "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any state or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. 151 et seq.], or any labor organization (other than when acting as an employer), or any corporation or association operating a hospital if no part of the net earnings inures to the benefit of any private shareholder or individual, or anyone acting in the capacity of officer or agent of such labor organization.

(3) The word "employee" includes any employee, but shall not be limited to the employees of a particular employer, unless this chapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employer by his parent or spouse.

(4) The word "representatives" includes any individual or labor organization.

(5) The words "labor organization" mean any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The word "commerce" means trade, traffic, commerce, transportation, or communication within the state of Utah.

(7) The words "affecting commerce" mean in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce within the state of Utah.

(8) The words "unfair labor practice" mean any unfair labor practice listed in section 34-20-8.

(9) The words "labor dispute" mean any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives.

(10) The words "secondary boycott" include combining or conspiring to cause or threaten to cause injury to one with whom no labor dispute exists, whether by: (a) withholding patronage, labor, or other beneficial business intercourse; (b) picketing; (c) refusing to handle, install, use, or work on particular materials, equipment, or supplies; or (d) by any other unlawful means, in order to bring him against his will into a concerted plan to coerce or inflict damage upon another.

(11) The word "election" means a proceeding in which the employees in a collective bargaining unit cast a secret ballot for collective bargaining representatives or for any other purpose specified in this chapter and shall include elections conducted by the board or by any tribunal having competent jurisdiction or whose jurisdiction was accepted by the parties.

(12) The words "labor relations board" mean the industrial commission of Utah.

History: C. 1953, 34-20-2, enacted by L. 1969, ch. 85, § 15.

34-20-3. Labor relations board.—(1) The industrial commission of Utah is designated as the labor relations board for the state of Utah.

(2) A vacancy in the board shall not impair the right of the remaining members to exercise all the powers of the board, and two members of the board shall at all times constitute a quorum. The board shall have an official seal which shall be judicially noticed.

(3) The board shall at the close of each fiscal year make a report in writing to the legislature and to the governor stating in detail the cases it has heard, the decisions it has rendered, the names, salaries and duties of all employees and officers in the employ or under the supervision of the board, and an account of all moneys it has disbursed.

History: C. 1953, 34-20-3, enacted by L. 1969, ch. 85, § 16.

Cross-References.

Board of labor to be provided, Const. Art. XVI, § 2.

Industrial commission, Title 35.

Function of board.

The function of the labor relations board is not to provide leadership for a union. Unless there is evidence of company interference, the action of the union membership in choosing their officers and in directing their activities is no concern to the board. Utah Poultry Producers Co-op. Assn. v Utah Labor Relations Board, 106 U. 394, 149 P. 2d 643.

Nature and jurisdiction of board.

The Utah Labor Relations Board is a creature of statute and any action brought by it is a special one under a statutory provision; therefore, there is no presumption of jurisdiction. Furbreeders Agricultural Co-op. v. Wiesley, 102 U. 601, 132 P. 2d 384.

Collateral References.

Labor Relations⇨501.

51A C.J.S. Labor Relations § 501.

48 Am. Jur. 2d 727, Labor and Labor Relations § 1155 et seq.

Enforcement of labor board's order against employer's successors, assigns, or the like, 46 A. L. R. 2d 592.

State's power to enjoin violation of collective labor contract as affected by federal labor relations acts, 32 A. L. R. 2d 829.

34-20-4. Labor relations board — Employees — Agencies — Expenses. —(1) The board may employ an executive secretary, attorneys, examiners, and may employ such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the state as it may from time to time find necessary for the proper performance of its duties. The board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys employed under this section may, at the direction of the board, appear for and represent the board in any case in court. Nothing in this act shall be construed to authorize the board to employ individuals for the purpose of conciliation or mediation (or for statistical work) where and if such service may be obtained from the department of labor.

(2) All of the expenses of the board, including the necessary traveling expenses, incurred by the members or employees of the board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the board or by any individual it designates for the purpose.

History: C. 1953, 34-20-4, enacted by L. 1969, ch. 85, § 17.

34-20-5. Labor relations board—Offices—Jurisdiction—Member's participation in case.—The principal office of the board shall be at the state capitol, but it may meet and exercise any or all of its powers at any other place. The board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the state. A member who participates in such inquiry shall not be disqualified from subsequently participating in a decision of the board in the same case.

History: C. 1953, 34-20-5, enacted by L. 1969, ch. 85, § 18.

34-20-6. Labor relations board—Rules and regulations.—The board shall have authority from time to time to make, amend and rescind such rules and regulations as may be necessary to carry out the provisions of this act. Such rules and regulations shall be effective upon publication in the manner in which the board shall prescribe.

History: C. 1953, 34-20-6, enacted by L. 1969, ch. 85, § 19.

Collateral References.

Labor Relations⇨513.
51A C.J.S. Labor Relations § 517.

34-20-7. Organization and collective bargaining—Employees' rights.—Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employees shall also have the right to refrain from any or all of such activities.

History: C. 1953, 34-20-7, enacted by L. 1969, ch. 85, § 20.

Collective bargaining agreement.

Although there is an express provision in the contract that employer cannot discharge an employee for lawful union activities, it is presumed that the parties do not intend to limit the common-law right of the parties to discharge or leave employment at the will of either, in the absence of an express provision or any provision in the agreement from which this can be implied. Held v. American Linen Supply Co., 6 U. (2d) 106, 307 P. 2d 210.

Union membership not a prerequisite.

Membership in the union is not a prerequisite to designating it as bargaining agent. International Union of Operating Engineers, Local No. 354 v. Industrial Comm. of Utah, 101 U. 139, 119 P. 2d 243.

Collateral References.

Labor Relations⇨171.
51 C.J.S. Labor Relations § 148.
48 Am. Jur. 2d 752, Labor and Labor Relations § 1198.

Construction and effect of termination and automatic renewal provisions in collective bargaining agreements, 17 A. L. R. 2d 754.

Continuance or termination of labor union's status or authority as bargaining agent, 42 A. L. R. 2d 1415.

Multi-employer group as appropriate bargaining unit under Labor Relations Act, 12 A. L. R. 3d 805.

Right of individual employee to enforce collective labor agreement against employer, 18 A. L. R. 2d 352.

Rights of collective action by employees as declared in § 7 of National Labor Relations Act (29 U.S.C., § 157), 6 A. L. R. 2d 416.

Severability of provisions in collective bargaining labor contracts, 14 A. L. R. 2d 846.

Subjects of mandatory collective bargaining under Federal Labor Relations Act, 12 A. L. R. 2d 265.

34-20-8. Unfair labor practices.—(1) It shall be an unfair labor practice for an employer, individually or in concert with others:

(a) To interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 34-20-7.

(b) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; provided, that subject to rules and regulations made and published by the board pursuant to section 34-20-6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(c) By discrimination in regard to hire or tenure of employment or any term of condition of employment to encourage or discourage membership in any labor organization; provided, that nothing in this act shall

preclude an employer from making an agreement with a labor organization (not established, maintained or assisted by any action defined in this act as an unfair labor practice) to require as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in subsection 34-20-9 (1) in the appropriate collective bargaining unit covered by such agreement when made.

(d) To refuse to bargain collectively with the representative of a majority of his employees in any collective bargaining unit; provided, that, when two or more labor organizations claim to represent a majority of the employees in the bargaining unit, the employer shall be free to file with the board a petition for investigation of certification of representatives and during the pendency of such proceedings the employer shall not be deemed to have refused to bargain.

(e) To bargain collectively with the representatives of less than a majority of his employees in a collective bargaining unit.

(f) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this act.

(2) It shall be an unfair labor practice for an employee individually or in concert with others:

(a) To coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in section 34-20-7, or to intimidate his family, picket his domicile, or injure the person or property of such employee or his family.

(b) To coerce, intimidate or induce an employer to interfere with any of his employees in the enjoyment of their legal rights, including those guaranteed in section 34-20-7, or to engage in any practice with regard to his employees which would constitute an unfair labor practice if undertaken by him on his own initiative.

(c) To co-operate in engaging in, promoting, or inducing picketing (not constituting an exercise of constitutionally guaranteed free speech), boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike.

(d) To hinder or prevent, by mass picketing, threats, intimidation, force, or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance.

(e) To engage in a secondary boycott; or to hinder or prevent, by threats, intimidation, force, coercion, or sabotage, the obtaining, use or disposition of materials, equipment, or services; or to combine or conspire to hinder or prevent the obtaining, use or disposition of materials, equipment or services, provided, however, that nothing herein shall prevent sympathetic strikes in support of those in similar occupations working for other employers in the same craft.

(f) To take unauthorized possession of property of the employer.

(3) It shall be an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employers or employees, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by subsections (1) and (2) of this section.

History: C. 1953, 34-20-8, enacted by L. 1969, ch. 85, § 21.

Cross-References.

Blacklisting forbidden, Const. Art. XII, § 19; 34-24-1.

Exchange of blacklists prohibited, Const. Art. XVI, § 4.

Charitable institutions.

Fact that hospital is a nonprofit charitable institution does not exclude it from Utah Labor Relations Act; and where union has been certified as exclusive bargaining agent for the employees and the labor relations board has ordered the hospital to enter into collective bargaining with the union, the hospital is required to comply. Utah Labor Relations Board v. Utah Valley Hospital, 120 U. 463, 235 P. 2d 520, 26 A. L. R. 2d 1012.

Conflict of laws.

Federal statute empowering National Labor Relations Board to cede its jurisdiction over unfair labor practices affecting commerce to state agency, with certain exceptions, is the exclusive means whereby states may act regarding matters which Congress has entrusted to the National Labor Relations Board; therefore, Utah labor relations board has no power to handle unfair labor charges within the jurisdiction of the national board where the national board has not ceded jurisdiction to the Utah board, although the national board has declined to exercise its jurisdiction. Guss v. Utah Labor Relations Board, 353 U. S. 1, 1 L. Ed. 601, 77 S. Ct. 598, reversing 5 U. (2d) 68, 296 P. 2d 733.

Federal legislation applies to labor-management relations in businesses involving interstate commerce and such federal legislation prevails over state law when the two conflict, but the conflict must be definite and irreconcilable. Utah Labor Relations Board v. Utah Valley Hospital, 120 U. 463, 235 P. 2d 520, 26 A. L. R. 2d 1012.

Peaceful picketing.

Parking a car on a roadway near the company's road construction camp, placing a placard or banner on the car with the word "picket" printed thereon, and with several men congregated about hailing approaching motorists and notifying them there is no work because of a labor dispute is peaceful picketing and, therefore, comes under the exception contained in parentheses in subsec. (2)(c) as an exercise of free speech. International Union of Operating Engineers, Local No. 3 v. Utah Labor Relations Board, 115 U. 183, 203 P. 2d 404.

Collateral References.

Labor Relations⊂⊃361.

51A C.J.S. Labor Relations § 328.

48 Am. Jur. 2d 377, Labor and Labor Relations § 539 et seq.

Discontinuance or suspension by employer of all or part of his operations, or lockout of employees, as unfair labor practice, 20 A. L. R. 3d 403.

Employer's decision to have work done by independent contractors rather than by employees as unfair labor practice, 6 A. L. R. 3d 1148.

Period of limitations or laches to be applied under 29 U.S.C., §§ 185, 187, in action for breach of labor contract or damages from unfair labor practice, 19 A. L. R. 3d 1034.

Removal of all or part of operations to new location as unfair labor practice, 5 A. L. R. 3d 733.

Request or demand for, or refusal of, transcription or recording of bargaining sessions or grievance negotiations as unfair labor practice, 24 A. L. R. 3d 706.

Validity and construction of state statutes making breach of a collective labor contract an unfair labor practice, 30 A. L. R. 3d 451.

What constitutes "financial or other support" within § 8 (a)(2) [29 U.S.C., § 158 (a)(2)] making such support of a union an unfair labor practice, 10 A. L. R. 3d 861.

Law Reviews.

Labor Law—Unfair Labor Practices—Union Discipline of Supervisors Who Are Performing Rank-and-File Struck Work Is Not an Unfair Labor Practice, 87 Harv. L. Rev. 458.

34-20-9. Collective bargaining—Representatives—Powers of board.—(1) Representatives designated or selected for the purposes of collective

bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rate of pay, wages, hours of employment, and of other conditions of employment, provided that any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(2) The board shall decide in each case whether, in order to ensure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision of same.

(3) Whenever a question affecting intrastate commerce or the orderly operation of industry arises concerning the representation of employees, the board may investigate such controversy and certify to the parties in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 34-20-10, or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(4) Whenever an order of the board made pursuant to subsection 34-20-10 (3) is based in whole or in part upon facts certified following an investigation pursuant to subsection (3) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 34-20-10 (5) or 34-20-10 (6), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the board shall be made and entered upon the pleadings, testimony and proceedings set forth in such transcript.

History: C. 1953, 34-20-9, enacted by L. 1969, ch. 85, § 22.

Construction and application.

Former subsec. (c), present subsec. (3) of this section, is practically identical with a section of Wagner Act and, therefore, interpretation given by federal courts is considered. Southeast Furniture Co. v. Industrial Comm., 100 U. 154, 111 P. 2d 153.

Industrial board can only make an order designating bargaining agent under this section and is without power to enter additional order compelling employer to bargain with the named agent as this may only be done after a proper complaint charging unfair labor practices is filed. Southeast Furniture Co. v. Industrial Comm., 100 U. 154, 111 P. 2d 153.

Under this section the legislature did not intend to require the same formality in hearings and pleadings that it did in section relating to unfair labor practices. Hotel Utah Co. v. Industrial Comm., 116 U. 225, 209 P. 2d 235.

The statute permits the selection of a bargaining representative by any suitable method, and the legislature has given the board the power to ascertain the will of the majority of a given group of employees by means other than an election. Hotel Utah Co. v. Industrial Comm., 116 U. 443, 211 P. 2d 200, affirming 116 U. 225, 209 P. 2d 235.

Appeal and review.

Orders made under this section are not appealable, but when an order is made under unfair labor practices section, 34-20-10, and properly appealed, the court may properly consider and review the order entered under this section with the final order issued under the other. Southeast Furniture Co. v. Industrial Comm., 100 U. 154, 111 P. 2d 153.

Jurisdiction.

Utah industrial commission does not have jurisdiction to ascertain, determine or certify the collective bargaining representative of employees of corporation whose business affects commerce as defined by subds. (6) and (7), sec. 2, of the National Labor Relations Act. National Labor Relations Board v. Industrial Comm. of State of Utah, 84 F. Supp. 593.

Union membership not a prerequisite.

Membership in the union is not a prerequisite to designating it as bargaining agent. International Union of Operating Engineers, Local No. 354 v. Industrial Comm. of Utah, 101 U. 139, 119 P. 2d 243.

Collateral References.

Labor Relations⇨191.

51 C.J.S. Labor Relations § 162.

48 Am. Jur. 2d 319, Labor and Labor Relations § 438 et seq.

Combination of separate plants or units of same employer as single bargaining unit, 12 A. L. R. 3d 787.

Duty of furnishing information to employee representatives, under National Labor Relations Acts, 2 A. L. R. 3d 880.

Effect of alleged misstatements or misrepresentations in campaign literature, material, or leaflets on validity of representation election, 3 A. L. R. 3d 889.

Multi-employer group as appropriate bargaining unit under Labor Relations Act, 12 A. L. R. 3d 805.

Rights of collective action by employees as declared in § 7 of National Labor Relations Act (29 U.S.C., § 157), 6 A. L. R. 2d 416.

Union's representations concerning initiation fees or dues as affecting its status as bargaining representative, 13 A. L. R. 3d 990.

34-20-10. Unfair labor practices—Powers of board to prevent—Procedure—Review.—(1) The board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice, as listed in section 34-20-8, affecting intrastate commerce or the orderly operation of industry. This power shall be exclusive and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law or otherwise.

(2) Whenever it is charged that any person has engaged in or is engaged in any such unfair labor practice, the board, or any agent or agency designated by the board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect and containing a notice of hearing before the board or a member of it, or before a designated agent or agency at a place therein fixed, not less than five days after the serving of the complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall be controlling.

(3) The testimony taken by such member, agent, or agency or the board shall be reduced to writing and filed with the board. Thereafter, in its discretion, the board upon notice may take further testimony or hear argument. If upon all the testimony taken the board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the board shall state its findings

of fact and shall issue and cause to be served on such person an order to cease and desist from such unfair labor practice and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the board shall state its findings of fact and shall issue an order dismissing the complaint.

(4) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the board may at any time, upon reasonable notice and in such manner as it may deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(5) The board shall have power to petition the Supreme Court of Utah for the enforcement of such order and for appropriate temporary relief or restraining order and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and shall have power to grant such temporary relief or restraining order as it deems just and proper and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the board. No objection that has not been urged before the board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the board, its member, agent or agency, the court may order such additional evidence to be taken before the board, its member, agent or agency, and to be made part of the transcript. The board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the Supreme Court shall be exclusive and its judgment and decree shall be final.

(6) Any person aggrieved by a final order, the board granting or denying in whole or in part the relief sought, may obtain a review of such order in the Supreme Court of Utah by filing in such court a written petition praying that the order of the board be modified or set aside. A copy of such petition shall be forthwith served upon the board, and the

ggrieved party shall file in the court a transcript of the entire record n the proceeding, certified by the board, including the pleading and testiiony upon which the order complained of was entered and the findings ınd order of the board. Upon such filing, the court shall proceed in the same nanner as in the case of an application by the board under subsection (5))f this section and shall have the same exclusive jurisdiction to grant to .he board such temporary relief or restraining order as it deems just ınd proper, and in like manner to make and enter a decree enforcing, 'nodifying and enforcing as so modified, or setting aside in whole or in part the order of the board; and the findings of the board as to the facts, ıf supported by evidence, shall in like manner be conclusive.

(7) The commencement of proceedings under subsections (5) or (6) of this section shall not, unless specifically ordered by the court, operate as a stay of the board's order.

(8) Petitions filed under this act shall be heard expeditiously, and if possible within ten days after they have been docketed.

History: C. 1953, 34-20-10, enacted by L. 1969, ch. 85, § 23.

Construction and application.

Much of the former section is derived from a similar section of the Wagner Act; therefore, interpretation by federal courts of this and other similar sections is considered. Southeast Furniture Co. v. Industrial Comm., 100 U. 154, 111 P. 2d 153.

To compel an employer to bargain with agent designated according to former section 34-1-9, present 34-20-9, board must await charge of unfair practices and filing of complaint under this section, and cannot short circuit procedure by ordering employer to bargain with agent at time of designation. Southeast Furniture Co. v. Industrial Comm., 100 U. 154, 111 P. 2d 153.

Utah labor relations board is a creature of statute and any action brought by it against an employer is a special one brought under a statutory provision; there is no presumption of jurisdiction. Furbreeders Agricultural Coop. v. Wiesley, 102 U. 601, 132 P. 2d 384.

It is sufficient compliance with requirements of this section that the board's findings state an ultimate fact, the discharge of employee for union activities. The board, an administrative body, may conclude, based on that finding, that defendant indulged in an unfair labor practice. Teamsters Local Union No. 222 v. Strevell-Paterson Hardware Co., 110 U. 388, 174 P. 2d 164.

Appeal and review.

Orders made under this section are appealable, while those made under former section 34-1-9, present 34-20-9, are not; however, when an order made pursuant to this section is properly before a court for review, the court may consider the board's action under both. Southeast Furniture Co. v. Industrial Comm., 100 U. 154, 111 P. 2d 153.

Evidence.

State labor relations board is not a court but primarily a fact-finding commission; its findings must be based on and supported by competent, material, and relevant evidence. Building Service Employees Local No. 59 v. Newhouse Realty Co., 97 U. 562, 95 P. 2d 597.

Although the rules of evidence which prevail in courts of law or equity are not applicable to hearings before the labor relations board, the material facts relied on to support the orders must be reasonably inferable from the evidence, and the procedure adopted by the board must afford all parties a reasonable opportunity to present their evidence. Utah Labor Relations Board v. Broadway Shoe Repairing Co., 120 U. 585, 236 P. 2d 1072.

Collateral References.

Labor Relations⇨396.

51A C.J.S. Labor Relations § 328.

48 Am. Jur. 2d 736, Labor and Labor Relations § 1171.

Enforcement of labor board's order against employer's successors, assigns, or the like, 46 A. L. R. 2d 592.

Jurisdiction of National Labor Relations Board over branch plant or separate department engaged in intrastate operations, where owner is engaged in interstate commerce in other plants or departments, 23 A. L. R. 2d 893.

State's power to enjoin violation of collective labor contract as affected by Federal Labor Relations Acts, 32 A. L. R. 2d 829.

34-20-11. Hearings and investigations—Power of board—Witnesses—Procedure.—For the purpose of all hearings and investigations, which, in the opinion of the board, are necessary and proper for the exercise of the powers vested in it by sections 34-20-9 and 34-20-10:

(1) The board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the board shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question, before the board, its member, agent, or agency conducting the hearing or investigation. Any member of the board, or any agent or agency designated by the board, for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the state at any duly designated place of hearing.

(2) In case of contumacy or refusal to obey a subpoena issued to any person, any district court of Utah within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business upon application by the board shall have jurisdiction to issue to such person an order requiring such person to appear before the board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(3) No person shall be excused from attending and testifying or from producing books, records, correspondence, documents or other evidence in obedience to the subpoena of the board on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(4) Complaints, orders, and other processes and papers of the board, its member, agent, or agency, may be served either personally, by certified or registered mail, by telegraph, or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post-office receipt or telegram receipt therefor when certified or registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the state, and witnesses whose depositions are taken and the persons

taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the state.

(5) The several departments and agencies of the state when directed by the governor shall furnish the board, upon its request, all records, papers, and information in their possession relating to any matter before the board.

History: C. 1953, 34-20-11, enacted by L. 1969, ch. 85, § 24.

Collateral References.

Labor Relations⇨521.

51A C.J.S. Labor Relations § 598.

48 Am. Jur. 2d 736, Labor and Labor Relations § 1171 et seq.

34-20-12. Willful interference—Penalty.—Any person who shall willfully resist, prevent, impede or interfere with any member of the board, or any of its agents or agencies, in the performance of duties pursuant to this act shall be punished by a fine of not more than $5,000, or by imprisonment for not more than one year, or both.

History: C. 1953, 34-20-12, enacted by L. 1969, ch. 85, § 25.

34-20-13. Right to strike.—Nothing in this act shall be construed so as to interfere with or impede or diminish in any way the right to strike.

History: C. 1953, 34-20-13, enacted by L. 1969, ch. 85, § 26.

Collateral References.

Labor Relations⇨365.

51A C.J.S. Labor Relations § 331.

48 Am. Jur. 2d 846, Labor and Labor Relations § 1360.

Eligibility of strikers to obtain public assistance, 57 A. L. R. 3d 1303.

Labor law: right of public employees to strike or engage in work stoppage, 37 A. L. R. 3d 1147.

Right of labor union to strike, picket, or impose boycott to compel payment by employer of fine or other penalty, 32 A. L. R. 2d 342.

CHAPTER 21

EIGHT-HOUR LAW

34-21-1. Repealed.

Repeal.

Section 34-21-1 (L. 1969, ch. 85, § 27), relating to the eight-hour day on public works and in penal institutions, was repealed by Laws 1971, ch. 73, § 11. For present provisions, see 34-30-8.

34-21-2. Eight-hour day—Smelters, mines and related industries—Exceptions.—The period of employment of working men in smelters and all other institutions for the reduction or refining of ores or metals, shall be eight hours per day, but work in excess of eight hours per day will not constitute a violation of the provisions of this section if the industrial commission certifies in writing to an employer that such work in the employer's institutions is not detrimental to the life, health, safety and welfare of the working men. Such certification shall not issue unless interested parties have been afforded an opportunity to present to the industrial commission